

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF ALASKA**

3
4 MATTHEW FOY,

5 Plaintiff,

6 v.

Case No. 3:23-cv-00039-SLG-KFR

7 STATE OF ALASKA, DEPARTMENT OF
8 CORRECTIONS, *et al.*,

9 Defendants.
10

11 **REPORT AND RECOMMENDATION TO DISMISS FOR FAILURE TO PROSECUTE**

12 **I. BACKGROUND**

13 On February 23, 2023, Plaintiff Matthew Foy, a self-represented prisoner,
14 filed a Complaint pursuant to 42 U.S.C. § 1983 (“Complaint”), as well as a Civil Cover
15 Sheet.¹

16 On June 30, 2023, this Court issued a Screening Order finding that Plaintiff’s
17 Complaint was deficient but granting Plaintiff leave to file an Amended Complaint.²
18 The Court directed Plaintiff to file either an Amended Complaint or a Notice of
19 Voluntary Dismissal by July 31, 2023.³ The Court cautioned Plaintiff that failure to
20 prosecute his case in accordance with these deadlines could result in his case being
21 dismissed, and that “[a] dismissal in this manner w[ould] count as a ‘strike’ against
22 Plaintiff under [28 U.S.C.] § 1915(g).”⁴

23 Plaintiff moved for three extensions of time to file an Amended Complaint,
24 each of which the Court granted.⁵ In granting Plaintiff’s last motion for an extension
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¹ Docs. 1; 2.

27 ² Doc. 9.

28 ³ *Id.* at 14–15.

⁴ *Id.* at 15.

⁵ Docs. 10; 11; 12; 13; 15; 16.

1 of time, the Court set a new deadline of March 4, 2024, for Plaintiff to file an
2 Amended Complaint.⁶ As of the date of this Report and Recommendation, Plaintiff
3 had not filed an Amended Complaint or a Voluntary Notice of Dismissal.⁷

4 II. DISCUSSION

5 Rule 41(b) of the Federal Rules of Civil Procedure permits dismissal due to a
6 plaintiff's failure to prosecute or comply with a court order. In deciding whether to
7 dismiss for failure to prosecute or comply with court orders, a district court must
8 consider five factors: "(1) the public's interest in expeditious resolution of litigation;
9 (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants;
10 (4) the public policy favoring disposition of cases on their merits; and (5) the
11 availability of less drastic sanctions."⁸

12 Here, the first two factors — the public's interest in expeditious resolution of
13 litigation and the Court's need to manage its docket — weigh in favor of dismissal.
14 Plaintiff's failure to file an Amended Complaint or Notice of Voluntary Dismissal
15 within the specified timeline suggests Plaintiff does not intend to litigate this action
16 diligently.⁹ Further, a presumption of prejudice to a defendant arises when the
17 plaintiff unreasonably delays prosecution of an action.¹⁰ Because Plaintiff has not
18 offered any justifiable reason for failing to meet the Court's deadline, the third factor
19 also favors dismissal.¹¹

20 The fourth factor usually weighs against dismissal because public policy
21 favors disposition on the merits.¹² However, "this factor lends little support to a

22 ⁶ Doc. 16.

23 ⁷ *Id.*

24 ⁸ *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)).

25 ⁹ *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991) (holding that a plaintiff has the burden "to move toward . . . disposition at a reasonable pace, and to refrain from dilatory and evasive tactics").

26 ¹⁰ *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976).

27 ¹¹ See *Hernandez*, 138 F.3d at 401 (reiterating that the burden of production shifts to the defendant to show at least some actual prejudice only after the plaintiff has given a non-frivolous excuse for delay).

28 ¹² *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002).

1 party whose responsibility it is to move a case toward disposition on the merits but
2 whose conduct impedes progress in that direction,”¹³ which is the case here.

3 The fifth factor is comprised of three subparts, which include “whether the
4 court has considered lesser sanctions, whether it tried them, and whether it warned
5 the recalcitrant party about the possibility of case-dispositive sanctions.”¹⁴ The
6 Court cannot move this case toward disposition without Plaintiff’s compliance with
7 Court orders or participation in this litigation. Furthermore, the Court’s Screening
8 Order gave Plaintiff an opportunity to amend his Complaint and warned him of the
9 potential dismissal of this action in the event of noncompliance.¹⁵

10 Based on the foregoing, this case must be dismissed. Although the Court
11 warned Plaintiff that failure to prosecute his case could lead to dismissal with
12 prejudice, dismissal without prejudice is a less drastic alternative and is appropriate
13 here. Dismissal without prejudice “minimizes prejudice to a defendant and
14 preserves a plaintiff’s ability to seek relief.”¹⁶ The Court finds no other lesser
15 sanction to be satisfactory or effective at this juncture. Accordingly, the Court
16 recommends dismissal without prejudice for failure to prosecute.

17 Pursuant to 28 U.S.C. § 1915(g) and *Lomax v. Ortiz-Marquez*,¹⁷ this dismissal
18 will count as a “strike” against Plaintiff. After three strikes, Plaintiff will be unable
19 to file lawsuits without paying the filing fee, unless he demonstrates that he is in
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21 ¹³ *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1228 (9th Cir. 2006)
(citing *In re Exxon Valdez*, 102 F.3d 429, 433 (9th Cir. 1996)).

22 ¹⁴ *Conn. Gen. Life Ins. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007).

23 ¹⁵ Doc. 9 at 14–15.

24 ¹⁶ See, e.g., *Henderson*, 779 F.2d at 1424 (a district court need not exhaust every sanction
25 short of dismissal before finally dismissing a case but must explore possible and meaningful
26 alternatives) (internal citation omitted); see also *Adriana Int’l Corp. v. Thoenen*, 913 F.2d
27 1406, 1412 (9th Cir. 1990) (explaining despite all the elaboration of factors, it is not always
28 necessary for the court to impose less serious sanctions first, or to give any explicit
warning); *Gleason v. World Sav. Bank, FSB*, No. 12-cv-03598-JST, 2013 WL 3927799, at *2
(N.D. Cal. July 26, 2013) (finding dismissal under Rule 41(b) appropriate where the court
previously attempted the lesser sanction of issuing an order to show cause and giving the
plaintiff an additional opportunity to replead); *Alli v. City & County of San Francisco*, No. 21-
cv-02193-TSH, 2022 WL 3099222 (N.D. Cal. 2022) (internal citations omitted).

¹⁷ 590 U.S. ___, 140 S. Ct. 172 (2020).

1 “imminent danger of serious physical injury.”¹⁸ The Court cautions Plaintiff as to
2 his strike status.

3 **IT IS THEREFORE RECOMMENDED:**

- 4 1. This action should be **DISMISSED WITHOUT PREJUDICE**.
5 2. All pending motions should be **DENIED AS MOOT**.
6 3. This dismissal should be a **STRIKE** under 28 U.S.C. § 1915(g).
7 4. The Clerk of Court should issue a final judgment.

8 DATED this 21st day of March, 2024, at Anchorage, Alaska.


KYLE E. PEARSON
United States Magistrate Judge
District of Alaska

13 **NOTICE OF RIGHT TO OBJECT**

14 Under 28 U.S.C. § 636(b)(1), a district court may designate a magistrate judge
15 to hear and determine matters pending before the Court. For dispositive matters, a
16 magistrate judge reports findings of fact and provides recommendations to the
17 presiding district court judge.¹⁹ A district court judge may accept, reject, or modify,
18 in whole or in part, the magistrate judge’s order.²⁰

19 A party may file written objections to the magistrate judge’s order within 14
20 fourteen days.²¹ Objections and responses are limited to five (5) pages in length and
21 should not merely reargue positions previously presented. Rather, objections and
22 responses should specifically identify the findings or recommendations objected to,
23 the basis of the objection, and any legal authority in support. Reports and
24 recommendations are not appealable orders. Any notice of appeal pursuant to Fed.
25 R. App. P. 4(a)(1) should not be filed until entry of the district court’s judgment.²²

26 ¹⁸ 28 U.S.C. § 1915(g).

27 ¹⁹ *Id.* § 636(b)(1)(B).

28 ²⁰ *Id.* § 636(b)(1)(C).

²¹ *Id.*

²² *See Hilliard v. Kincheloe*, 796 F.2d 308 (9th Cir. 1986).